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No. 89-662

In the Supreme Court of the United States

OCTOBER TERM, 1989

MIDDLE EARTH GRAPHICS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by coercing, threatening, transferring, and discharging employees because of their union support.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 3a-4a), including the decision and recommended order of the administrative law judge (Pet. App. 5a-43a), is reported at 283 N.L.R.B. No. 1049.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1989. A petition for rehearing was denied on July 6, 1989. Pet. App. 1a. The petition for a writ of certiorari was filed on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act, 29 U.S.C. 157, broadly guarantees to employees the "right to

self-organization." In order to protect that statutory right, Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), prohibits employers from taking any action "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7]." And Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), specifically prohibits employers from interfering with employees' union activities "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

2. Petitioner is a commercial printer in Kalamazoo, Michigan. Until the spring of 1984, petitioner was a relatively small firm with approximately ten employees. At that time, however, petitioner received a large contract that called for a staff increase, and in particular, hiring more bindery employees. Pet. App. 7a-8a. In June 1984, petitioner's owner, Louis Hall, told two recently hired bindery employees, Garry and Karen Root, that a "union would never 'get in here. I will close my doors before I will let a union in here.' " *Id.* at 9a. Hall also told Lidell Ford, another employee, that he would "close the g.d. doors" before he would permit a union to come into petitioner's shop. *Ibid.* Ford had a similar conversation with petitioner's general foreman, Rod Chalker, who "expressed the opinion that Hall would close the plant before he would permit it to become unionized." *Ibid.*

During the summer of 1984, Wayne Ford, another employee, spoke with petitioner's foreman, Don Antolovich, and "observed that, if the plant were unionized, [petitioner] would stop a lot of activities which Ford objected to, such as twelve-hour workdays and cutting incentive rates." Pet. App. 9a. The foreman responded "that a union would be nice but there was 'no chance of it.' " *Ibid.* Early that fall, Karen Root contacted the United Paperworks Union (the Union); as a result, petitioner's employees began to discuss

the possibility of unionization. After foreman Antolovich learned of these activities, he told bindery employees that petitioner "was keeping a complete file on who talked union at the plant." *Ibid.*

On November 7, 1984, petitioner convened a meeting of its merging line bindery employees. At the meeting, petitioner introduced a representative from Manpower Temporary Services, a local firm that provided businesses with employees on a contract basis. The Manpower representative told the merging line employees that they would have to sign up to be employed by Manpower but would continue to work for petitioner with the same rate of pay and benefits.[1] Later that day, Lidell Ford, a collator, spoke to various merging line employees about the plan to shift those employees to Manpower's payroll. Ford told his co-workers that, if they signed up for Manpower, they would not be eligible to vote for the Union. Foreman Antolovich promptly reported Ford's comments to petitioner's owner, Louis Hall. Pet. App. 11a.

Hall summoned Lidell Ford to his office the following morning. Hall told Ford that he had "written proof that Ford had wilfully damaged * * * [a] collating machine," and fired him. Pet. App. 11a. Ford denied that accusation, asked to see the written statements, and also asked to speak with the employees who had leveled the charges. Hall agreed only to provide Ford with copies of the written statements when he received his final paycheck. Hall reneged on that arrange-

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[1] During the next few days, several supervisors suggested that petitioner would require only merging line employees to transfer to Manpower's payroll. For example, general foreman Chalker told Debra Schrock, a collator helper, that she would not have to sign up for Manpower "as long as you don't talk union." Pet. App. 12a.

ment. The record confirms that no such written statements existed at the time Hall fired Ford. *Id.* at 11a-12a.[2]

On Saturday evening, November 10, Lidell Ford held a union meeting at his home. All those employees present signed union cards. Pet. App. 13a. The following Monday, November 12, petitioner's management, including Hall, and Manpower representatives met with all of petitioner's employees. Hall announced that "all employees, except for the 'original ten,' would be required to transfer from [petitioner's] payroll to the Manpower payroll." *Id.* at 13a, 14a.[3] When employees pressed Hall for an explanation of the transfer, his only response was "[n]o comment." *Ibid.* Employees Cole and Cannon "then stated aloud that the only reason the transfer to Manpower was taking place was because of the union." *Ibid.* Hall then stated that the transfer "was taking place so that he could protect himself from what Lidell Ford had done the preceding week." *Ibid.*

When Cannon reported to work the following day, foreman Antolovich told him that he was fired. Pet. App. 14a. On the evening of November 14, employees Garry and Karen Root and Clark Olson attended a union meeting. The three reported to work the following morning wearing union buttons. The Roots and Olson each objected to signing with Manpower, as previously ordered, because they wanted to

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[2] Several days later, foreman Antolovich told employee Patricia Cole that petitioner "was trying to make a case against Lidell Ford," and offered her $25 if she would "go into court and say she saw Ford tampering with the machinery." Pet. App. 13a. Cole declined to commit perjury, "insisting that she would not lie either for or against Ford." *Ibid.*

[3] As the Board observed, Hall's reference to the "original ten" was his "way of describing the employees who had been working for him before the work force expansion took place in the spring of 1984." Pet. App. 14a.

Hall also made clear that all supervisors, pressmen, and office personnel would remain on petitioner's payroll. Pet. App. 14a.

form a union. Petitioner had the police remove those employees from the premises. *Id.* at 15a-16a.[4]

Petitioner managed to transfer nineteen of its employees to Manpower's payroll, although those employees continued to work in petitioner's plant.[5] Shortly thereafter, the Union, on November 21, filed a petition with the Board to represent petitioner's production and maintenance employees. The Union also filed with the Board a series of unfair labor practice charges against petitioner. Pet. App. 16a.

2. In December 1984, the Board's General Counsel issued an unfair labor practice complaint alleging, among other charges, that petitioner had violated the Act by discharging the following employees because of their union support: Lidell Ford, Wayne Ford, Garry and Karen Root, James Cannon, and Clark Olson. Instead of proceeding to a hearing, the parties, in April 1985, executed an informal settlement agreement. Under that settlement, petitioner agreed to pay specified amounts of back pay to the six employees, to offer them full and immediate reinstatement to their former jobs without prejudice to their seniority or other rights and privileges previously enjoyed, and to cease and desist from further unfair labor practices. Pet. App. 17a.

Petitioner, however, breached the settlement agreement by not offering the discriminatees immediate reinstate-

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[4] Petitioner also fired Wayne Ford for refusing to sign with Manpower. Pet. App. 16a.

[5] Among those transferred employees was Houston Ford, Lidell Ford's brother. Sometime in late November, Hall told Houston Ford that he had fired Lidell because he "had been harassing employees and had tampered with the collator." Pet. App. 16a. Hall volunteered that "Lidell was trying to bring a union into the plant, and there was 'no way in hell' that [Hall] would permit a union to come into the company." *Ibid.*

ment.[6] Instead, in early May petitioner notified each discriminatee by letter that, although "you are reinstated to your former position," "[d]ue to lack of production requirements, there is no work available for you at this time." Pet. App. 17a, 18a.[7] All six of the discriminatees had been permanent, full-time employees. *Id.* at 33a. With the possible exception of Karen Root, none of them received a bona fide offer of reinstatement to his or her former job or to a substantially equivalent position. For example, when Lidell Ford reported back to work, petitioner assigned him work that required considerably more skill than his previous assignment. When, as expected, Ford had difficulty handling the new assignment, petitioner refused to train him and later insisted that Ford sign a statement that he was unable to perform the assigned work. In addition, reciting allegations that were factually false, petitioner reprimanded Ford for reporting late. As a result of these incidents, petitioner assigned Ford to a new job that paid substantially less than his previous position. Ford continued actively to promote the union cause. After a month, petitioner laid off Ford, along with Karen Root, ostensibly for lack of work. *Id.* at 22a-24a, 33a, 36a.[8]

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[6] Petitioner paid the backpay due under the agreement. Pet. App. 17a.

[7] During this period, petitioner rehired nine former employees that had been transferred to Manpower's payroll. Pet. App. 18a.

[8] Petitioner treated the other four discriminatees in a similar manner. Petitioner offered Garry Root a part-time job, without benefits. Petitioner did not adequately notify James Cannon of a reinstatement offer and later rebuffed Cannon's attempts to discuss the matter. Petitioner told Wayne Ford, whose telephone was disconnected, that he must have a working telephone in order to return to work—a plain violation of the settlement agreement. Petitioner later fired Ford for disregarding a message to report to work—a message Ford had never received. Pet. App. 19a-22a, 34a.

Petitioner's breach of the settlement agreement prompted the Union to file additional unfair labor practice charges. The Board's General Counsel issued an amended complaint against petitioner. The original and amended complaints were consolidated for a hearing before an administrative law judge in late January and early February 1986.

3. Adopting the findings and conclusions of the ALJ, the Board found that petitioner had violated Section 8(a)(1) and (3) of the Act by coercing, threatening, transferring, and discharging employees because of their union support. Pet. App. 5a-43a.[9] Before turning to specific violations charged in the complaint, the Board observed that a brochure prepared and distributed by petitioner at a November 2 promotional open house "demonstrated clear evidence of animus which should be considered in placing the [pertinent] events * * * in proper focus." *Id.* at 9a, 25a.[10]

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[9] The Board specifically found that petitioner had violated Section 8(a)(1) of the Act by threatening employees with plant closure, discharge, and other reprisals, by coercively questioning employees about their own and their co-workers' union activities, by creating the impression that petitioner was monitoring employee union activities, and by trying to bribe an employee to commit perjury in connection with petitioner's firing of a union activist. Pet. App. 26a-27a. The Board also found that petitioner had violated Section 8(a)(1) and (3) of the Act by firing employees Garry and Karen Root, Clark Olson, and Wayne Ford as a direct result of its transfer of bindery employees to Manpower's payroll, where petitioner had taken that step in order to stave off a nascent unionization effort. Pet. App. 29a-31a. The Board further found that petitioner had violated Section 8(a)(1) and (3) of the Act by firing employees Lidell Ford and James Cannon because of their union support. Finally, the Board found that petitioner had breached the settlement agreement by failing properly to reinstate discharged employees and by discriminating further against Lidell Ford, Karen Root, and Wayne Ford, in violation of Section 8(a)(1) and (3) of the Act. Pet. App. 4a, 31a-36a.

[10] That brochure was "a humorous elaboration of Hall's tongue-in-cheek proposal for a new 51st state, to be carved out of the existing

The Board then found that petitioner had committed ten separate violations of Section 8(a)(1) of the Act in the course of opposing its employees' union activity. See Pet: App. 26a-27a.

Turning to petitioner's firings of Lidell Ford, Wayne Ford, Garry and Karen Root, James Cannon, and Clark Olson, the Board initially observed that petitioner knew that all six employees were union sympathizers and that each employee had been fired by "[a]n employer whose intense and implacable anti-union sentiments ha[d] been itemized and documented" in the previous Section 8(a)(1) findings. Pet. App. 27a; see *id.* at 26a-27a. The Board specifically found that petitioner's firing of Lidell Ford "was a clumsy fabrication from beginning to end." *Id.* at 28a. The Board determined that Ford's discharge, "[c]oming as it did one day after Ford had urged mergers to refrain from signing up for Manpower so they could continue their organizing efforts, * * * was the direct result of [his] union activities, which were the only reason for his termination." *Id.* at 28a-29a. The Board similarly found that petitioner's firing of Cannon, who "[l]ike L. Ford, * * * was discharged within twenty-four hours after making a pro-union statement in the presence of supervisors," was triggered by his expression of union sympathies. *Id.* at 29a.

Finally, the Board rejected petitioner's claim that "considerations falling within the scope of business judgment"

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state of Michigan and named Six-One-Six after the telephone area code for Western Michigan." Pet. App. 25a. The brochure depicted Six-One-Six as an area of great business potential and identified Hall as a leading force in the community. The brochure stated that "[a]ccess to the State of Six-One-Six will be severely restricted." *Ibid.* And, using the medieval imagery of moats and drawbridges, the brochure proclaimed that "[d]rawbridges will be raised to keep out such undesirable elements as labor organizers." *Ibid.*; see also *id.* at 65a (color reprint of brochure).

prompted its decision to transfer to Manpower all of its employees other than the "original ten." Pet. App. 29a-30a. The Board found that petitioner made that decision when union activity began to surface at the plant, and that "the economic benefits and cost effectiveness of the move were only casually considered by [petitioner] before the decision was taken, if, indeed, such matters were considered at all." *Id.* at 30a. The Board further noted that petitioner had initially decided to replace merging line employees with Manpower employees, but "[w]hen evidence evolved that union sentiment was spreading throughout the plant, [petitioner] enlarged upon its original plan and discharged all of its bindery employees" to prevent unionization, and "as a part of [that] defensive scheme," fired Garry and Karen Root, Wayne Ford, and Clark Olson. *Id.* at 31a.

4. The court of appeals enforced the Board's order in an unpublished decision. Pet. App. 2a. The court concluded that "the findings and order of the Board are in accordance with the law and supported by substantial evidence." *Ibid.* The court therefore held that petitioner had violated Section 8(a)(1) and (3) of the Act by coercing, threatening, transferring, and discharging employees because of their union support.

ARGUMENT

1. Petitioner contends (Pet. 8-21) that the Board, in finding that the firm had violated Section 8(a)(1) and (3) of the Act, improperly relied on petitioner's promotional brochure, which is protected speech under Section 8(c) of the Act, 29 U.S.C. 158(c).[11] Petitioner, however, did not

[11] Section 8(c) provides:

> The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or

raise that issue before the Board. Consequently, Section 10(e) of the Act, 29 U.S.C. 160(e),[12] bars judicial review of that claim. *E.g.*, *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). For that reason alone, further review of petitioner's claim should be denied.

In any event, the claim is meritless. The Board and the courts of appeals have long held that expressions of opposition to unionism, although not in themselves unlawful, may be considered as background evidence in deciding whether other acts committed by the employer violated the National Labor Relations Act. As one court has remarked, "[t]here is a vast difference between the use of protected statements as evidence of an unfair labor practice, and the use of such statements to draw the background of the controversy and place other nonverbal acts in proper perspective. The latter is all the Board did here." *International Union, UAW* v. *NLRB*, 363 F.2d 702, 707 (D.C. Cir.), cert. denied, 385 U.S. 973 (1966); accord *NLRB* v. *Wright Line, Inc.*, 662 F.2d 899, 907 n.14 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); *NLRB* v. *General Electric Co.*, 418 F.2d 736, 761 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970); *Orchard Corp. of America* v. *NLRB*, 408 F.2d 341, 342 (8th Cir. 1969); *Darlington Mfg. Co.* v. *NLRB*, 397 F.2d 760, 769 (4th Cir. 1968) (en banc), cert. denied, 393 U.S. 1023 (1969); *Hendrix Mfg. Co.* v. *NLRB*, 321 F.2d 100, 103 (5th Cir. 1963); *NLRB* v. *Putnum Tool Co.*, 290 F.2d 663, 665 (6th Cir. 1961); *NLRB* v. *Kropp Forge Co.*, 178 F.2d

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visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

[12] Section 10(e) provides in pertinent part that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

822, 827-828 (7th Cir. 1949), cert. denied, 340 U.S. 810 (1950).[13]

In this case, petitioner has not seriously challenged the Board's findings that it committed numerous violations of Section 8(a)(1) of the Act.[14] And, in concluding that

[13] None of the decisions cited by petitioner (Pet. 8-10), see, *e.g.*, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966); *NLRB* v. *Exchange Parts Co.*, 375 U.S. 405 (1964); and *NLRB* v. *United Steelworkers*, 357 U.S. 357 (1958), suggests, let alone holds, that the Board may not use as background material statements protected by Section 8(c). In *NLRB* v. *Gissel Packing Co.*, for example, the Court, among other things, addressed the standards governing the threshold determination whether employer anti-union statements were protected speech under Section 8(c). 395 U.S. at 616-620. And in *NLRB* v. *United Steelworkers*, the Court held, under the facts presented, that employers' enforcement of rules prohibiting union organizational solicitation did not constitute unfair labor practices. 357 U.S. at 361-365. The Court's passing reference to Section 8(c), see 357 U.S. at 362 (Section 8(c) protects employer's right to "engage in non-coercive anti-union solicitation"), scarcely supports petitioner's novel construction of that provision.

In *Linn* v. *Plant Guard Workers*, the Court held that Section 8(c) did not preempt a state-law cause of action for malicious libel occurring during a union organizing campaign. 383 U.S. at 55, 57-66. Although the Court stated that Section 8(c) "prevent[s] the Board from attributing anti-union motive to an employer on the basis of his past statements," 383 U.S. at 62-63 n.5, the Court did not read that provision as precluding the Board from considering such a statement as background, along with other evidence, to determine an employer's anti-union motive in unfair labor practice proceedings. Finally, in *NLRB* v. *Exchange Parts Co.*, the Court held that Section 8(a)(1) prohibits an employer from conferring economic benefits on its employees shortly before a representation election, where the employer's purpose is to affect the outcome of that election. 375 U.S. at 409-410. There, the Court had no occasion to consider the relevance of an employer's Section 8(c) statements to motive because the employer's "motive [was] otherwise established." *Id.* at 410.

[14] Indeed, petitioner has avoided discussion of those findings. But "unchallenged [findings of violations] * * * do not disappear by not

petitioner's actions were motivated by hostility to unionization, the Board relied on the now uncontested "specific violations of [Section 8(a)(1)] of the Act alleged and found in this case." Pet. App. 25a, 26a-27a. In these circumstances, therefore, Section 8(c) did not preclude the Board from considering petitioner's brochure as background evidence. That brochure "revealed nothing of substance not shown by other evidence," nor did the brochure "add to, [or] detract from" the quantum of evidence needed to support the Board's decision. *Darlington Mfg. Co.* v. *NLRB*, 397 F.2d at 769.

Contrary to petitioner's claim (Pet. 17-21), the courts of appeals have not adopted a construction of Section 8(c) that precludes the Board from considering otherwise lawful employer anti-union statements for background purposes in resolving unfair labor practice charges. Rather, the courts have held only that statements protected by Section 8(c) may not themselves give rise to violations of the National Labor Relations Act.[15] In *NLRB* v. *Colvert Dairy Products Co.*, 317 F.2d 44, 46 (10th Cir. 1963), for example, the court of appeals held that the Board may not use an employer's protected statements during a union drive "as a basis authorizing an unfavorable inference in the appraisement of [the employer's] conduct and the credibility of its witnesses." The court, however, made clear that it was "not inferring that evidence of [anti-union] attitude is not material to or admissible in the determination of intent or the judging of

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being mentioned in a brief. They remain, lending their aroma to the context in which the [contested findings] * * * are considered." *NLRB* v. *Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982).

[15] For that reason as well, petitioner errs in suggesting (Pet. 16-21) that panels in the First, Sixth, and Eighth Circuits have reached conflicting decisions regarding the application of Section 8(c). And even if such intra-circuit conflicts existed, those conflicts would not call for further review by this Court. See, *e.g.*, *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

credibility in labor cases. It often is." *Ibid.* Similarly, in *NLRB* v. *Rockwell Mfg. Co.*, 271 F.2d 109, 117-119 (3d Cir. 1959), the court of appeals held that the Board may not use an employer's protected statements as a basis for concluding that the employer's otherwise proper inquiries and statements amounted to coercive unfair labor practices. And in *Indiana Metal Products Corp.* v. *NLRB*, 202 F.2d 613, 617 (7th Cir. 1953), the court of appeals concluded that, without other probative evidence establishing union animus, the Board could not rely on an employer's non-coercive letters explaining its opposition to unionization to support an unfair labor practice charge of a discriminatory firing.

3. Finally, petitioner contends (Pet. 21-22) that the Board's findings that petitioner committed unfair labor practices are not supported by substantial evidence. In light of the record before both the Board and the court of appeals, see, *e.g.*, pp. 2-6, *supra*, that contention is groundless. In any event, petitioner's fact-specific claim is plainly undeserving of this Court's attention. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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